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Filed via ECFS

September 12, 2007

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition of Qwest for Forbearance Pursuant to 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services,* WC Docket No. 06-125

Dear Ms. Dortch:

Qwest Corporation and Qwest Communications Corporation hereby file a petition for forbearance from applying Title II and the Commission's *Computer Inquiry* rules to the broadband services specified in the petition. A copy of the petition is attached hereto. On March 19, 2006, the Commission granted, by operation of law, an identical petition filed by the Verizon telephone companies ("Verizon"). Qwest now seeks the same relief that was given to Verizon nearly 18 months ago.

Qwest requests that the Commission establish an expedited comment cycle for Qwest's petition, in light of the disparate regulatory treatment that currently exists between similarly situated providers of the broadband services in question. Qwest and Verizon compete head-to-head in the provision of these services across the country. The two companies are identically situated in all material respects, except that Verizon is considerably larger than Qwest. As a result of the Verizon grant, however, Qwest and Verizon compete for enterprise broadband sales on a regulatory playing field that is sharply tilted in Verizon's favor. It is imperative that all providers of these services operate on a similar regulatory footing with regard to these services. Given these circumstances, it is critical that the Commission act quickly on Qwest's petition to afford Qwest the same regulatory relief under which Verizon currently operates.

Sincerely,

/s/ Melissa Newman

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Petition for Forbearance Under	)	WC Docket No. 06-125
47 U.S.C. § 160(c) from Title II and	)	
Computer Inquiry Rules with Respect	)	
to Broadband Services	)	

QWEST PETITION FOR FORBEARANCE

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QWEST PETITION FOR FORBEARANCE

I. INTRODUCTION AND SUMMARY

Qwest Corporation and Qwest Communications Corporation (also jointly referred to as "Qwest") hereby request that the Federal Communications Commission ("Commission"), pursuant to Section 10(c) of the Communications Act,[1] forbear from applying Title II and the *Computer Inquiry* rules to any broadband services Qwest does or may offer. Effective on March 19, 2006 the Commission granted an identical petition filed by the Verizon telephone companies ("Verizon").[2] Qwest now seeks the relief granted to Verizon by operation of law. That is, Qwest seeks forbearance from Title II and *Computer Inquiry* regulation for any broadband services it does or may offer to the extent those services are not offered as part of an Internet access service.[3] Like Verizon, we seek forbearance from two categories of services. The first category is packet-switched services capable of 200kbps in each direction. The second category includes non-TDM based optical networking, optical hubbing, and optical transmission services. Like

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[1] 47 U.S.C. § 160(c).

[2] *See* News Release, "Verizon Telephone Companies' Petition for Forbearance from Title II and *Computer Inquiry* Rules with Respect to their Broadband Services Is Granted by Operation of Law," rel. Mar. 20. 2006

[3] In its February 17, 2006 *ex parte* presentation, Verizon clarified that it was not seeking forbearance "of federal universal service obligations for the services at issue in this petition." Qwest adopts this commitment as part of its petition. Verizon *ex parte*, WC Docket No. 04-440, dated Feb. 17, 2006.

Verizon, Qwest seeks relief for the services at issue regardless of the nature of the customer to whom the service is offered.[4] Attachment A contains a more detailed description of the services that Qwest offers that qualify under each of these two categories..

There are two separate grounds on which the Commission must grant this petition. First, Qwest is entitled to relief Verizon has already received. Qwest and Verizon compete head-to-head across the country. The two companies are identically situated in all material respects (except that Verizon is considerably larger than Qwest). Now, as a result of the Verizon grant, Qwest and Verizon compete for enterprise broadband sales on a regulatory playing field that is sharply tilted in Verizon's favor. Thus, immediate grant of this petition is required based upon the Verizon grant. If the Commission were to deny Qwest's petition it would need to explain why Verizon was entitled to relief that the Commission denied to Qwest. Such a denial would be unfairly discriminatory, and could not be supported under either administrative or constitutional law. Because Qwest is seeking relief identical to that Verizon received, granting Qwest's petition is a "ministerial act." The Commission does not have the discretion to deny or delay Qwest's request for relief.

Second, and separately, forbearance is required on the merits. The same three-factor analysis that applies to Verizon also applies to Qwest. It is impossible to find that Verizon meets the forbearance standard in Section 10(a) of the Act, without finding that Qwest also meets the same standard. Accordingly, the Commission should promptly grant Qwest's "me too" forbearance petition.

Given these circumstances, there is no basis for the Commission to take the full twelve-month period in Section 10(a) to rule on this petition. Indeed, the Commission typically has

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[4] Verizon *ex parte*, WC Docket No. 04-440, dated Feb. 7, 2006 at 2-3.

acted more quickly on "me too" forbearance petitions than the preceding petition that initially sought the forbearance relief. In light of the asymmetrical regulatory relief currently enjoyed by Verizon, it is imperative that the Commission act expeditiously to extend that relief to Qwest and other similarly situated competitors in the enterprise broadband market.

II. BACKGROUND

Title II and the *Computer Inquiry* rules were made for a world in which the local exchange carrier ("LEC") wireline platform dominated the market. Under Title II, which was developed in the context of "a prior era of circuit-switched, analog voice services characterized by a one-wire world for access to communications" incumbent local exchange carriers ("ILECs") such as Qwest Corporation "are generally treated as dominant carriers," and are subjected to common carriage requirements under Title II.[5] These include, among other things, tariff filing, cost support, and pricing requirements.[6] Moreover, because Qwest Corporation is a Bell Operating Company ("BOC"), its broadband services are subject to the anachronistic *Computer Inquiry* rules.[7] The *Computer Inquiry* rules impose a series of obligations on BOCs that offer "enhanced services," including, among other things, Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements that force them to unbundle

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[5] *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22747-48 ¶¶ 4, 5 (2001) ("*ILEC Broadband NPRM*").

[6] *See, e.g.*, 47 U.S.C. §§ 201-204, 214.

[7] *See In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C. 2d 267 (1971) *("Computer I")*; *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulation* (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II*"); *In the Matter of Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, Report and Order, 14 FCC Rcd 4289 (1999) (collectively the "*Computer Inquiry*" Rules).

their broadband transmission services and to separate out and offer the transmission component of their services pursuant to tariff, on cost-based terms and conditions.[8] The Commission has acknowledged that the *Computer Inquiry* rules were "developed before separate and different broadband technologies began to emerge and compete for the same customers. Further, these rules were adopted based on assumptions associated with narrowband services, single purpose network platforms, and circuit-switched technology."[9] "At the time the *Computer Inquiry* rules were adopted, there was an implicit, if not explicit, assumption that the incumbent LEC wireline platform would remain the only network platform available to enhanced services providers."[10]

The Commission has long been considering the regulatory framework for broadband services. Nine years ago the Commission sought comment on whether it should eliminate the

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[8] *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14876-77 ¶ 42 (2005) ("*Broadband Access to the Internet Order*"). *See also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, Report and Order, 16 FCC Rcd 7418, 7442 ¶ 40 (2001); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237, 19247 ¶ 21 (1999); *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998); 47 U.S.C. §§ 202(a), 203.

[9] *Broadband Access to the Internet Order*, 20 FCC Rcd at 14876-77 ¶ 42 (citations omitted).

[10] *Id.* at 14877 ¶ 43.

Computer III requirements.[11] Five-and-a-half years ago, the Commission began a rulemaking to consider changes to the framework under which ILECs offer broadband services.[12] Two years ago, the Commission finally addressed the subset of broadband services used for Internet access services and concluded that broadband Internet access services offered by wireline facilities-based providers need not be offered under Title II or the *Computer Inquiry* regime.[13] Last year, all of Verizon's broadband services -- even those not used for Internet access -- received regulatory freedom when the Verizon forbearance petition was granted by operation of law. Qwest now seeks identical relief for its broadband services.

Fundamentally, it is irrational to apply the burdensome Title II and *Computer Inquiry* rules to Qwest Corporation when it provides broadband services like ATM and Frame Relay to large business customers.[14] While long distance carriers, such as Sprint or AT&T's long distance affiliate, are subject to Title II, the Commission now permits these carriers to operate free of dominant carrier regulation and tariffing requirements. The Commission initially reduced the regulation of long distance interexchange carriers ("IXCs") by declaring that they were non-dominant, and accordingly not subject to many of the regulations of Title II.[15] Later, the

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[11] *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Service; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6046 ¶ 6 (1998) (inviting comment on whether the Commission should eliminate the ONA, CEI, and other *Computer III* requirements).

[12] *See* note 5, *supra, ILEC Broadband NPRM*, 16 FCC Rcd 22745.

[13] *See* note 8, *supra, Broadband Access to the Internet Order* 20 FCC Rcd 14853.

[14] *See* Comments of Qwest Communications International Inc., CC Docket No. 01-337, filed Mar. 1, 2002 at 3-8.

[15] *See, e.g., In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* Order, 11 FCC Rcd 3271, 3273 ¶ 1 (1995) ("the record evidence demonstrates that AT&T lacks market power in the interstate, domestic, interexchange market, and accordingly, we grant its motion to be reclassified as a non-dominant carrier with respect to that market.").

Commission removed Title II tariff regulation when it ordered that it would "no longer require or allow nondominant interexchange carriers to file tariffs pursuant to Section 203 for their interstate, domestic, interexchange services."[16] Even more favored than long distance carriers is Verizon, which as a result of its forbearance grant, is allowed to offer all broadband services, even those not used for Internet access, as non-common carriage, and does not bear *any* Title II burdens. Qwest seeks the same relief here.

III. ARGUMENT

Qwest and Verizon compete head to head, and are identically situated, but for their size and the regulatory playing field, which is tilted in Verizon's favor. Because there is no difference between Qwest and Verizon, for purposes of this relief, it would be unfairly discriminatory to allow the regulatory disparity to continue. Given the Commission's decisions not to regulate Verizon, it must also refrain from regulating Qwest. As the U.S. Department of Justice has long recognized, "[a]pplying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals."[17]

Qwest is entitled to an immediate grant of identical relief based upon the Verizon grant. Because the parties are identically situated and compete head to head, granting this petition is a "ministerial act" about which the Commission has limited discretion. In any event, Qwest also easily meets all of the forbearance criteria.

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[16] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended,* 11 FCC Rcd 20730, 20732-33 ¶ 3 (1996) ("*Detariffing Order*"). The *Detariffing Order* resulted in a situation where "carriers in the interstate, domestic, interexchange marketplace will be subject to the same incentives and rewards that firms in other competitive markets confront." *Id.* at 20733 ¶ 4.

[17] Reply Comments of the U.S. Department of Justice, *Competition in the Interstate*

A. The Commission Must Immediately Grant This Petition As A Ministerial Act Based Solely On The Grant Of Verizon's Petition

The Commission must immediately grant the petition because in allowing the Verizon petition to be granted by operation of law the Commission has created intolerable regulatory asymmetry between identically situated competitors. Grant of the Verizon forbearance petition gives Verizon, Qwest's direct competitor in the sale of broadband, significant market freedoms that allow Verizon to market and sell its broadband services. Verizon and Qwest are in direct competition because each competes not only in the region where it provides local exchange services, but also on a nationwide basis. It would be arbitrary and capricious, and a violation of law for the Commission to allow Verizon to compete against Qwest on the basis of the Verizon forbearance grant, without giving identical relief to Qwest.

In fact, the grant of the Verizon petition has made grant of similar relief to Qwest a "ministerial act." That is, the Verizon grant provides an independent basis for immediate grant of this petition. Because granting this petition based on the Verizon grant is ministerial, it can be done immediately pursuant to an order that relies only on the Verizon grant. There are three reasons. First, Qwest is requesting relief identical to that granted to Verizon. Second, Verizon's forbearance petition was based upon national data, as was appropriate since Verizon and Qwest sell broadband products in a national market. Third, Qwest and Verizon are identically situated, except that Verizon is considerably larger than Qwest.

It is a fundamental tenet of administrative law that an agency cannot treat similarly situated entities differently without a reasoned explanation -- an explanation that goes beyond a simple recital of perceived factual differences without analysis. This requirement comes not

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Interexchange Marketplace, CC Docket No. 90-132 at 26 n.42, filed Sept. 28, 1990.

only from the Constitutional guaranty of equal protection of the law,[18] but also from the fundamental requirement of rationality in administrative actions. The rule was stated explicitly by the D.C. Circuit in *Garrett v. FCC*:

> Hitherto, we have had occasion to deal with claims of disparate decisional treatment accorded parties by administrative bodies. Speaking of one agency, we have twice said that it "cannot act arbitrarily nor can it treat similar situations in dissimilar ways," and we remanded litigation to the agency when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike. We have pursued the same course with respect to the agency now before us where "the differences [were] not so 'obvious' as to remove the need for explanation." These rulings vividly reflect the underlying principle, that agency action cannot stand when it is "so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion."[19]

Qwest is entitled as a matter of law to the identical relief that Verizon obtained unless the Commission could articulate some rational basis for denying Qwest the relief that Verizon received.

The Commission cannot make such a distinction for two reasons. First, there is no meaningful distinction that would justify denial of forbearance to Qwest when the identical forbearance sought by Qwest has already been obtained by Verizon. If anything, the size difference between Qwest and Verizon dictates that the Qwest petition would need to be granted even if the Verizon petition had been denied. Thus, no rationale can support granting Verizon's petition, but denying Qwest's. Second, the Verizon grant eliminates the need for the Commission to independently analyze the three factors under Section 10(a).

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[18] *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985); *Yick Wo v. Hopkins*, 118 U.S. 356, 367-68 (1886).

[19] *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975). *See also, Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) ("[T]he Commission's refusal to at least explain its different treatment of appellant and NBC was error."); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978) ("We cannot affirm a Commission order that does not clearly and explicitly articulate the standards which govern the behavior both of licensees that have violated the fairness doctrine and those that have not.").

The Commission's action in granting this petition would be "ministerial." A "ministerial act" is one "where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the governments, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process."[20] Qwest's legal right fits into the category of ministerial acts that the Commission is compelled to perform -- in this case, by granting Qwest's petition. The Commission has a duty to align Qwest's regulatory status with Verizon's. Eliminating the current discriminatory regulatory structure is a sufficient basis to warrant grant of this petition, based upon the grant to Verizon. This means that Qwest is entitled to grant of its forbearance petition without analysis of the factors set forth in Sections 10(a) and (b) of the Act. The grant of Verizon's petition eliminates the need for the normal forbearance analysis.

The Commission is no more empowered to use the forbearance process to create (or permit) unlawful or irrationally discriminatory regulatory regimes than it is entitled to affirmatively create a discriminatory regulatory regime, for example with a rulemaking that results in one rule for Verizon and another rule for everyone else. Because the Commission chose to permit the Verizon petition to take effect by operation of law, Qwest is entitled to an order that simply says that the Qwest petition is granted in order to ensure that the grant of the Verizon petition is applied equally to all similarly situated market participants.[21] Once the

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[20] *Cunningham v. Mason and Brunswick RR Co.,* 109 U.S. 446, 452-53 (1883); *see also, Noble v. Union River Logging Railroad Company*, 147 U.S. 165, 171 (1893) and cases cited.

[21] Under one view of the BellSouth and Verizon petitions, this relief has already been granted to Qwest. The Verizon petition expressly requested grant of a similar petition filed by BellSouth. Verizon Petition at 24. The BellSouth Petition sought forbearance on behalf of all ILECs, not just BellSouth. *See* Petition for Forbearance, BellSouth Telecommunications, Inc., filed Oct. 27, 2004, WC Docket No. 04-405 at 33. BellSouth subsequently withdrew its petition. However, the Verizon petition was worded such that a grant of the BellSouth petition is necessarily included in the grant of the Verizon petition. Therefore, the grant of the Verizon petition

Commission has granted forbearance to one party, that grant requires the Commission to apply the same standard to all similarly situated entities.[22] This allows the Commission to grant Qwest's petition based upon the Verizon grant rather than based upon a new analysis of the factors set out in Section 10.

Since it is not necessary for the Commission to undertake a detailed forbearance analysis here, the Commission should be able to act quickly on Qwest's petition. Such expeditious relief is further warranted in light of the current regulatory advantages enjoyed by Verizon in the provision of enterprise broadband services.

B. The Forbearance Statute, Particularly When Taken Together With Section 706, Requires The Commission To Forbear From Regulating Qwest's Broadband Services

As Verizon showed,[23] the forbearance statute, particularly when construed with Section 706 requires the Commission to forbear from regulating broadband services. "Congress enacted the Telecommunications Act of 1996 (1996 Act) for the express purposes of promoting competition, reducing regulation, and encouraging the rapid deployment of new telecommunications technologies."[24] The Commission has acknowledged that:

> An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations. Specifically, the Commission is *required* to forbear from any statutory provision or regulation if it

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necessarily applies to all ILECs, *i.e.*, the relief that BellSouth requested. A simple ministerial grant of this petition is a more conservative course of action, and we do not here rely upon Verizon's request that the BellSouth petition be granted. However, we reserve the right to make this argument in the future.

[22] Obviously if the Commission were to adopt a rule that discriminated against Qwest in the fashion that the Verizon grant could (if it denied this petition), such a rule would be *per se* unlawful.

[23] Verizon Petition at 12-13.

[24] *See* Preamble, Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

> determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. In making such determinations, the Commission must also consider pursuant to section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[25]

Section 10 thus requires the Commission to "reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest."[26]

Moreover, in the current context, Section 706 underscores the necessity of forbearing from applying the burdensome Title II and *Computer Inquiry* rules to Qwest's broadband services. "Section 706 of the 1996 Telecommunications Act directs both the Commission and the states to encourage deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis . . . [and] to take action to accelerate deployment, if necessary."[27] Notably, Section 706 "direct[s] the Commission to use the authority granted in other provisions, *including the forbearance authority under section 10(a),* to encourage the deployment of advanced services."[28]

Having granted the petition of Verizon, a market share leader, any other conclusion with

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[25] *In the Matter of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21501-02 ¶ 11 (2004) ("*Section 271 Order*") (footnotes and citations omitted, emphasis added).

[26] 141 Cong. Rec. S7881, S7887 (daily ed. June 7, 1995).

[27] *Availability of Advanced Telecommunications Capability in the United States, Fourth Report to Congress*, FCC 04-208, rel. Sept. 9, 2004 at 8.

[28] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24044-45 ¶ 69 (1998) (emphasis added) ("*Advanced Services Order*").

respect to the broadband services provided by Qwest, a small player in a vibrant market marked by vigorous competition, would be arbitrary and capricious. Qwest is not only identically situated to Verizon, its greatly smaller size and resources make the case for grant of the Qwest petition considerably more compelling than is the case for Verizon. For this reason, and because this is a "me too" petition,[29] the Commission should grant this petition quickly. Qwest easily meets the statutory criteria.

1. The Commission Should Forbear from Applying Title II to Qwest's Broadband Services

As the Commission has observed, "[t]he basic elements of the existing regulatory requirements for the provision of broadband services by incumbent LECs were initially developed in a prior era of circuit-switched, analog voice services characterized by a one-wire world for access to communications" that existed "well before the development of competition between providers of broadband services" and were based upon a perceived need to curb the exercise of anti-competitive market power.[30] Given the broadband services available from multiple providers this "one-wire" world simply does not exist in today's broadband market. Like the application of the *Computer Inquiry* rules, discussed below, applying Title II common carrier requirements in this age of abundant broadband competition is not justified, particularly in light of the Commission's statutory duty under Section 706 to promote broadband development and deployment through reduced regulation.

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[29] The Commission typically grants "me too" petitions before the statutory deadline passes. For example, then-SBC, Verizon and then-BellSouth sought and obtained forbearance from application of separate affiliate requirements of Section 272 to international directory assistance services. The first petition, SBC's was filed in March 2003, the last petition, BellSouth's was filed in November 2003. All three petitions were granted in March 2004, just four months after the last petition was filed.

[30] *ILEC Broadband NPRM,* 16 FCC Rcd at 22747 ¶ 4, 22765 ¶ 38.

As Verizon demonstrated, the "Commission's treatment of local telephone company broadband services under Title II . . . has not been the product of a considered decision on the part of the Commission. Instead, Title II has been applied to wireline broadband reflexively, through 'regulatory creep.' That is, because the telephone companies provided voice services subject to Title II, the Commission reflexively subjected them to Title II regulation in their provision of broadband as well."[31] Unfortunately for the competitive markets, Title II common carrier regulations impose several unnecessary burdens on Qwest that prevent, rather than protect, competition. For example:

- Applying the Title II rules to broadband contributes significantly to the delay in introducing new broadband services to consumers because, unlike its competitors, Qwest Corporation is required to develop and file cost support data that are available to its competitors for similar services, and to support those filings in the face of any challenges or questions.

- Imposing mandatory tariffs reduces Qwest Corporation's ability to respond efficiently to customer demand and imposes substantial administrative costs; limits the ability of customers to negotiate and obtain service arrangements specifically tailored to their needs; and inhibits carriers from introducing new services and responding to new offerings by rivals, who through Qwest Corporation's tariff filings obtain advance notice of Qwest Corporation's services and promotions and can respond by undercutting the new offerings even before the tariff becomes effective.

- Imposing a requirement that broadband rates be cost-justified prevents Qwest Corporation from experimenting with market-based pricing models.

- Title II requirements limit Qwest's ability to respond to competition, particularly where, as often happens in this market, a customer is seriously considering a number of different providers.

As the Commission has concluded, "deregulation or reduced regulation may lower administrative costs, encourage investment and innovation, reduce prices and offer consumers

[31] Verizon Petition for Limited Reconsideration of Title I Broadband Order, CC Docket Nos. 02-33, 95-20 and 98-10, filed Nov. 16, 2005 at 12.

greater choice."[32] Imposing these Title II regulatory requirements on Qwest, but not its competitors, has precisely the opposite effect. Given that Qwest has no market power in the broadband market, there is no justification to apply the Title II common carriage requirements.[33]

Refusing to forbear from Title II regulations would be inconsistent with the repeated recognition of both the federal courts and the Commission that a carrier may appropriately be treated as a common carrier with respect to some services but not others,[34] and that, in the absence of a *voluntary* undertaking to serve all customers indiscriminately, common carrier duties may only be imposed upon a service based on a finding that "the public interest . . . require[s] the carrier to be legally compelled to serve the public indifferently" because an operator "has *sufficient market power*."[35] Here, the competitive status of the broadband market precludes such a finding, since it is clear that Qwest does not have any market power.

As discussed below, Qwest's request for forbearance from Title II regulation satisfies each of the criteria in Section 10; enforcement of that regulation is not necessary to ensure just and reasonable prices; such enforcement is not necessary to protect consumers; and the requested forbearance is consistent with the public interest.

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[32] *ILEC Broadband NPRM*, 16 FCC Rcd at 22765 ¶ 39; *see In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445, 449 ¶ 12 (1981) (noting that even in a market that is not yet fully competitive, the costs of regulatory compliance "can have profoundly negative implications for consumer welfare" such that a reduction in regulatory burdens is appropriate).

[33] *See* Verizon Petition at 8-9; BellSouth Petition at 29-33.

[34] *Southwestern Bell Tel. Co. v. FCC,* 19 F.3d 1475, 1481 (D.C. Cir. 1994).

[35] *See In the Matter of AT&T Submarine Sys., Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21588-89 ¶¶ 7-9 (1998) (emphasis added); *Virgin Islands Tel. Corp. v. FCC,* 198 F.3d 921, 925-27 (D.C. Cir. 1999); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525* F.2d 630, 642 (D.C. Cir. 1976); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC,* 533 F.2d 601, 608 (D.C. Cir. 1976).

a. "Just and Reasonable" Prices

To grant forbearance, the Commission must first determine that "enforcement of [the challenged] regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, *for, or in* connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[36] In light of the competitive market in which Qwest competes to sell its broadband services, the regulations imposed by Title II are not needed to ensure competitive prices. Instead, they prevent more effective competition that would lower prices and improve services for consumers.

As the Commission previously recognized in conducting the Section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."[37] The Commission is well aware that broadband competition for large business customers is intense. In connection with the Verizon/MCI and SBC/AT&T mergers, the Commission analyzed the competition for medium and large enterprise customers, such as those who buy Frame Relay, Virtual Private Networks and the other broadband products.[38] The findings were particularly relevant to the issue of whether Qwest's broadband services should be offered

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[36] 47 U.S.C. § 160(a)(1).

[37] *In the Matter of Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270 ¶ 31 (1999).

[38] *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18463-77 ¶¶ 56-81 (2005) ("*Verizon/MCI Merger Order*"); *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18321-35 ¶¶ 57-80 (2005) ("*SBC/AT&T Merger Order*").

pursuant to Title II. Specifically, the Commission found that competition for medium and large enterprise customers is strong, with a significant number of companies competing in the market.[39] As the attached table shows, Qwest is a much smaller competitor than the combined Verizon/MCI. *See* Attachment B.

The new entity is larger than Qwest by at least a factor of two in every segment. In some segments the new entity is six times larger than Qwest.

There are numerous competitors available to enterprise broadband customers. Under the Commission's own well-settled precedent, it must take all of these alternatives into account in its analysis of broadband competition. The Commission has held that a proper market analysis must "examine not just the markets as they exist today," but must also take account of "future market conditions," including technological and market changes, and the nature, complexity, and speed of change, as well as trends within the communications industry.[40]

Other precedent further supports Qwest's petition. For example, the Commission concluded that Verizon's, SBC's, and BellSouth's requests for forbearance with respect to their international directory assistance services satisfied section 10(a)(1) because these carriers "would be new entrants in the market for [these services]" and, "[a]s such, . . . likely would face competition from interexchange carriers . . . , Internet service providers, and others in the provision of those services."[41] The Commission also found it highly *relevant that* there was "no

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[39] *Verizon/MCI Merger Order*, 20 FCC Rcd at 18463 ¶ 56; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18321 ¶ 56.

[40] *In the Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19989-90 ¶ 7, 20011-12 ¶¶ 40-41 (1997) ("*Bell Atlantic/NYNEX Merger Order*").

[41] *In the Matters of Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to Provide International Directory Assistance Services; Petition of Verizon for*

indication that the petitioners have used, or could use, their ownership interests in dominant foreign carriers to control access by other domestic carriers to directory listing information for the countries where those carriers operate."[42]

That reasoning applies with at least as much force here because Qwest likewise "do[es] not exercise control over the components used to provide" the broadband services of its competitors,[43] and because it faces competition in the broadband market at least as rigorous as that found in the international directory assistance market. As set out above, competition exists in all segments of the broadband market, and this competition will ensure just and reasonable prices. Therefore, the first forbearance requirement is clearly satisfied.

Moreover, the conclusion that forbearance is warranted is strongly reinforced by the Commission's overarching obligation under Section 706 to resolve ambiguities in a way that promotes the long-term deployment of greater broadband infrastructure.[44] In turn, this increased investment will help to ensure effective competition in the long term against the market leaders.

Further Forbearance from Section 272 Requirements in Connection with Directory Assistance Services; Petition of BellSouth for Forbearance under 47 U.S.C. § 160(c) from Application of the Separate Subsidiary Requirements of Section 272 of the Communications Act of 1934, as Amended, to Provide International Directory Assistance Service, Memorandum Opinion and Order, 19 FCC Rcd 5211, 5221 ¶ 16 (2004) ("*SBC IDA Order*").

[42] *Id.* at 5223 ¶ 19.

[43] *Id.* at 5224 ¶ 20.

[44] *See* 47 U.S.C. § 157; *Advanced Services Order*, 13 FCC Rcd at 24044-45 ¶ 69. Forbearance here is also consistent with the Commission's decision to forbear from applying tariffing requirements to SBC's provision of advanced services through its affiliate, ASI. *See In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002). In that *Order*, the Commission concluded that tariff regulation is not "necessary for ensuring that the rates, terms, and conditions for ASI's advanced services are just, reasonable, and not unjustly or unreasonably discriminatory" instead finding that "the better policy is to allow ASI to respond to technological and market developments without our reviewing in advance the rates, terms, and conditions under which ASI provides service." *Id.* at 27012-13 ¶ 22.

Forbearance will thus further the Act's goal of "boosting competition in broader markets."[45]

Here, allowing Qwest, which clearly lacks market power in the broadband market, to compete on equal terms with other market participants will promote competition for broadband services, thereby leading to lower prices and better service for all broadband consumers.

b. Consumer Protection and Public Interest

For largely the same reasons, Section 10(a)(2) and (3) are satisfied as well: *i.e.*, imposing Title II regulation on Qwest's broadband services is unnecessary to protect consumers,[46] and forbearance is in the public interest.[47] The Commission has repeatedly recognized that increased competition and the resulting consumer benefits satisfy the "public interest" prong of the forbearance test.[48] As the statute requires, in deciding what is in the public interest, the Commission must consider whether forbearance will "promote competitive market conditions."[49] Treating Qwest in a manner that is at least as favorable as that afforded to the major players in the market easily meets that test. Allowing Qwest to offer broadband services on a non-common carriage basis free from the regulatory strictures of Title II will promote more aggressive competition that will inevitably lead to lower prices, better service, and increased availability of broadband services. Just as the Commission found with respect to broadband serviced offered for Internet access, allowing broadband services that are not used for Internet access to be offered on a non-common carriage basis will best enable Qwest to embrace a market-based approach to its business relationships with its customers, providing the flexibility and freedom to

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[45] *USTA II,* 359 F.3d 554, 579 (D.C. Cir. 2004) (quoting *USTA I).*

[46] *See* 47 U.S.C. § 160(a)(2).

[47] *Id.* § 160(a)(3).

[48] *See Section 271 Order*, 19 FCC Rcd at 21511-12 ¶ 33; *SBC IDA Order*, 19 FCC Rcd at 5224-25 ¶ 21.

[49] 47 U.S.C. § 160(b).

enter into mutually beneficial commercial arrangements.[50] Non-common carriage contracts will permit customers to enter into various types of compensation arrangements that may better accommodate their individual market circumstances, and to modify those arrangements over time as their needs change.[51]

2. The Commission Should Forbear from Applying the *Computer Inquiry* Rules to Qwest's Broadband Offerings

For similar reasons, the Commission should also forbear from applying the intrusive *Computer Inquiry* rules to Qwest's broadband services.[52] In particular, the Commission should forbear from applying the CEI and ONA requirements. Given Qwest's place in the broadband market, these rules are counterproductive and should be lifted.

As explained above, the *Computer Inquiry* rules were adopted at a time when "very different legal, technological and market circumstances" existed,[53] and "the core assumption underlying the *Computer Inquiry* rules was that the *telephone network* is the primary, if not exclusive, means through which information service providers can obtain access to customers."[54]

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[50] *Broadband Access to the Internet Order*, 20 FCC Rcd at 14899-900 ¶ 87.

[51] *Id.* at 14900 ¶ 88.

[52] *See* BellSouth Petition at 17-29.

[53] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and* Requirements, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3038 ¶ 38 (2002).

[54] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4825 ¶ 44 (2002) (stating that the *Computer Inquiry* rules were directed at "*bottleneck* common carrier facilities," *id.* at 4820 n.139). Indeed, in *Computer II,* the Commission expressly found that carriers that had no control over local bottleneck facilities, and therefore "d[id] not have . . . market power," would not be in a position to act anti-competitively. *Computer II,* 77 F.C.C. 2d at 468-69 ¶ 221; *see The People of the State of California v. FCC,* 39 F.3d 919, 923-24 (9th Cir. 1994) *(Computer Inquiry* rules

Yet, as shown above, no category of competitors in the broadband market -- certainly not Qwest -- enjoys "bottleneck" control over broadband transmission facilities in any segment of the broadband market. Thus, the "core assumption" underlying the *Computer Inquiry* rules is misplaced when it comes to broadband services provided by Qwest.

Applying the *Computer Inquiry* rules to Qwest's broadband services conflicts directly with Congress's clearly expressed desire to promote broadband development and deployment through reduced regulation. As the Commission recognized in the *Broadband Access to the Internet Order*, the *Computer Inquiry* rules hinder the development of new broadband services as well as the development of network and service arrangements that customers want, and the unnecessary costs of these rules discourage investment and discourage new broadband deployment.[55] Imposing rules that inhibit Qwest's ability to compete in the broadband market while larger competitors in the market are free from similar regulatory requirements simply cannot be justified. For example, the fifteen-day interval required under the CEI rules for short-term notice of a network change may sound relatively insignificant. However, if Qwest is trying to win the business of a potential customer that is considering a number of providers, a fifteen-day delay in getting back to the potential customer with Qwest's solution is critical when trying to meet or beat a competitor's offering on a timely basis.

In sum, the three prerequisites for forbearance are easily met in the case of the *Computer Inquiry* rules. As discussed above in the context of the Title II regulations, declining to apply these vestigial regulations will lead to more effective competition in an already competitive market. This competition prevents any possibility that Qwest could charge anything other than

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responded to the belief that "the telephone industry could use its monopoly of the [telephone] lines to prevent competition from developing in the enhanced services industry").

[55] *Broadband Access to the Internet Order*, 20 FCC Rcd at 14875-79 ¶¶ 41-46.

"just and reasonable" prices or take other steps that would harm consumers. Moreover, the public will benefit from the more efficient competition that Qwest would be able to mount.

IV. CONCLUSION

For the foregoing reasons, the Commission should act expeditiously to forbear from applying Title II common carrier requirements or *Computer Inquiry* rules to any broadband services that Qwest does or may offer.

Respectfully submitted,

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September 12, 2007

Attachment A

Qwest Product	Product Description
Frame Relay	Frame Relay Service (FRS), employing digital technology, provides high-speed access connections and throughput to interstate service providers or provides high-speed throughput to intraLATA interstate Local Area Networks (LANs), as well as host access capabilities and interLATA interstate FRS. FRS supports transmission speeds up to DS3.
ATM	ATM Service is a connection-oriented communications service that uses Asynchronous Transfer Mode (ATM) technology. The service provides customers with high-speed, low-delay information transfer capacity, which supports applications that require near-real-time mixed media (data, video, image, voice) communications among multiple locations. ATM supports transmission speeds of DS1, NxDS1, DS3, OC3, and OC12.
Metro Optical Ethernet (QMOE)	QMOE Service is a flexible, easy-to-use, data transport service that uses established Ethernet transport technology. QMOE allows customers to connect multiple enterprise locations within a service area using Ethernet protocol.
Local Area Network Switching Service	Local Area Network (LAN) Switching Service (LSS) is a transport service designed to interconnect LSS interfaces between customer-designated premises. LSS provides a specific amount of bandwidth, and supports both point-to-point and multipoint connectivity between customer-designated locations. LSS data is transported over 45 Mbps and 155 Mbps access facilities using fiber optic facilities or equivalent.
Synchronous Service Transport	Synchronous Service Transport (SST) is a point-to-point private line that is the next logical step in the evolution of voice, data and video transport. SST offers the connectivity and a variety of capacities to accommodate customer needs. SST is provisioned on single-mode, fiber-optic cable and employs only the highest-quality, carrier-class equipment. SST utilizes Synchronous Optical Network technology (SONET) for transmission at speeds of OC-3 at 155.52 Mbps, OC-12 at 622.08 Mbps, OC-24 at 1.25 Gbps, OC-48 at 2.49 Gbps and OC-192 at 9.95 Gbps.
Ethernet Ports over SONET (EPoS) on SST & SHNS	Ethernet Ports over SONET (EPoS) provides Ethernet protocol interface for managed optical transport of data signals of various speeds over Company-provided Synchronous Service Transport (SST) as set forth in Section 7.14, and Self-Healing Network Service (SHNS) as set forth in Section 15. EPoS allows for point-to-point transmission on SST and SHNS bandwidths at speeds of 10 Mbps, 100 Mbps or 1 Gbps.

Attachment A

Qwest Product	Product Description
GeoMax	GeoMax is a high-speed, multi-protocol, fiber optic data transport service. It utilizes Dense Wave Division Multiplexing (DWDM) technology to enable two or more optical signals having different wavelengths to be simultaneously transmitted in the same direction over one strand of fiber. DWDM technology is protocol and bit rate independent, thus enabling GeoMax service to support multiple customer-native protocols and applications on a single platform. Concatenated Optical Carrier levels are fully supported and include OC3c, OC12c and OC48c.
Broadcast Digital Transport Video Service	BDTVS channels are provided between customer-designated premises or between a customer-designated premises and a QC serving wire center. Interactive two-way service will be provisioned by the combination of two one-way video circuits. Video enabling equipment transmits 45 Mbps video signals on a fiber network and converts the signal to an analog signal for hand-off at the customer-designated premises.
HDTV Net	HDTV-Net is a one-way, point-to-point application. The service is provided over standard fiber optic facilities for transport of a video signal that is encoded to 270 Mbps in conformance with digital television equipment operating at 525 lines and 60 fields per second.
Self Healing Network Service (SHNS)	SHNS is a dedicated bi-directional ring facility between multiple customer-specified node locations. SHNS utilizes Synchronous Optical Network technology (SONET) for transmission at speeds of OC-3 at 155.52 Mbps, OC-12 at 622.08 Mbps, OC-48 at 2.49 Gbps and OC-192 at 9.95 Gbps.
QWave	QWave service is a long-haul optical wavelength service that utilizes DWDM technology offered in capacities of 2.5 Gigabits and 10 Gigabits.
Private line OC3, OC12 and OC48	Private Line OC3, OC12 and OC48 are domestic interLATA private line point-to-point physical links between two QCC points of presence. Private Line service provides a fixed capacity of bandwidth for transport of the customer's digital communications traffic.
Metro Private Line	Metro Private Line provides dedicated point-to-point, private line connections between two customer locations, over a shared, high-capacity fiber-optic network. The locations can be single-customer buildings, multi-tenant units or carriers' POPs.

ATTACHMENT B

Market Share (percentages)

Product Sectors	Verizon	MCI	TOTAL	Qwest	Sources
Business Market Share by Revenue					
U.S. Private Line and Data Services	**14.8**	**23.9**	**38.7**	**4.2**	**Atlantic-ACM, The New Long Distance Landscape 2004-2009, 8-04 (2004E data)**
Total Wholesale SONET Services - North America	12.9	9.5	22.4	12.1	Frost & Sullivan, North American Wholesale SONET Services Market, 2006 (2005 data)
U.S. Wholesale IP Revenue	**5.5**	**26.8**	**32.3**	**3.9**	**IDC, U.S. Wholesale IP Forecast and Analysis, 2003-2007, #30467, 12-03 (2002 data)**
U.S. Business IP Revenue	**2.9**	**17.4**	**20.3**	**2.8**	**IDC, U.S. Business IP Connectivity Forecast and Analysis, 2003-2007 , #30449, 11-03 (2002 data)**
U.S. IP VPN Services	**1.0**	**13.7**	**14.7**	**3.1**	**In-Stat, The U.S. IP VPN Services Market: A Key Battleground for Service Providers, 5-25-06 (2005 data)**
U.S. Network Based IP VPN Services	**0.5**	**15.6**	**16.1**	**4.4**	**In-Stat, The U.S. IP VPN Services Market: A Key Battleground for Service Providers, 5-25-06 (2005 data)**
U.S CPE-Based IP VPN Services	**1.8**	**10.9**	**12.7**	**1.2**	**In-Stat, The U.S. IP VPN Services Market: A Key Battleground for Service Providers, 5-25-06 (2005 data)**
U.S. ATM	**4.3**	**22.2**	**26.5**	**5.7**	**Vertical Systems Group (2003 data)**
U.S. Frame Relay	**3.4**	**18.8**	**22.2**	**4.6**	**Vertical Systems Group (2003 data)**

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **QWEST PETITION FOR FORBEARANCE** to be filed with the Secretary of the FCC via the FCC's Electronic Comment Filing System in WC Docket No. 06-125.

/s/ Richard Grozier
Richard Grozier

September 12, 2007